

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ALEXANDER WILLIAM FETTERS,

Defendant/Movant.

Cause No. CR 10-1-BU-DWM

ORDER GRANTING MOTION TO
REOPEN TIME TO APPEAL

This case came before the Court on Defendant/Movant Alexander William Fetters' motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The motion and a certificate of appealability were denied on December 18, 2014.

Fetters filed a notice of appeal on February 27, 2015. Assuming the date Fetters signed the document was the date it was delivered to prison authorities for mailing, the notice was filed on February 19, 2015. Notice of Appeal (Doc. 155) at 4; *Houston v. Lack*, 487 U.S. 266, 270 (1988).

On May 26, 2015, the Ninth Circuit Court of Appeals construed the notice as a motion to reopen the time for appeal and asked this Court to rule on the motion at its earliest convenience. *See United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2010).

Fed. R. App. P. 4(a)(6) authorizes district courts to reopen the time for

appeal if the following three conditions are met:

- (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
- (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
- (C) the court finds that no party would be prejudiced.

The docket of the case shows that Fetters did not receive the Order of December 18, 2014, within 21 days. His service copy was returned to the Clerk marked “postage due” on January 8, 2015 (Docket Entry 154), the 21st day after issuance of the Order. Condition (A) is met.

Fetters must also show that he filed his notice of appeal/motion to reopen within 14 days of the date he received a service copy of the Order; or, if he never received the Order, within 180 days of issuance of the Order on December 18, 2014. Fetters states that, as of February 18, 2015, he still had not received the Order. Notice of Appeal (Doc. 155) at 2. As it was re-sent to him on January 8, 2015, the delay is unexplained. While Fetters states he was told by court staff that his mail was mistakenly sent to his previous institution, USP Beaumont in Texas, *see* Mot. to Reopen (Doc. 155) at 2, the docket shows that mail was duly sent to Fetters at USP Florence after he filed notice of his change of address (Doc. 148;

Docket Entries 149, 153). Skeptical though the Court is, *see, e.g.*, Order (Doc. 153) at 11-13; Presentence Report ¶¶ 30-33, nothing contradicts Fetters' statement that he had not received his service copy of the Order as of February 18, 2015. Taking that representation as true, his notice/motion was certainly filed fewer than 14 days after whatever date he received the Order. Alternatively, assuming he still has not received it, he filed his notice/motion well within 180 days of the date of the December 18 Order. Therefore, the Court finds that Condition (B) is also met.

As to the third factor, prejudice to any party, there is none. Fetters' time to appeal expired on February 16, 2015, just three days before he signed the notice of appeal. Further, the United States was not required to appear in this matter. Condition (C) is met.

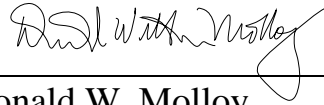
The Court finds all three conditions of Fed. R. App. P. 4(a)(6) are met.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Fetters' notice of appeal, construed as a motion to reopen the time for appeal under Fed. R. App. P. 4(a)(6), is GRANTED.
2. Although time to appeal is REOPENED for a period of 14 days from the date of this Order, Fetters' notice of appeal (Doc. 155) need not be refiled.
3. The Clerk shall promptly advise the Ninth Circuit Court of Appeals of the making of this Order.
4. The Clerk shall include a copy of the Court's Order of December 18,

2014, with Fetters' service copy of this Order.

DATED this 28th day of May, 2015.

A handwritten signature in black ink, appearing to read "Donald W. Molloy", is written above a horizontal line.

Donald W. Molloy
United States District Court